DATE: July 8, 1992
CASE NO. 91-ERA-14

IN THE MATTER OF

WILLIAM R. GORE,

COMPLAINANT,

v.

CDI CORPORATION and CAROLINA
POWER AND LIGHT COMPANY,

RESPONDENTS.

BEFORE: THE SECRETARY OF LABOR

FINAL DECISION AND ORDER

Before me for review is the Recommended Order of Dismissal (R.D. and O.) of the Administrative Law Judge (ALJ) in this case which arises under Section 210 of the Energy Reorganization Act of 1974, as amended (ERA), 42 U.S.C. § 5851 (1988). The ALJ recommends that the complaint be dismissed under Rule 41(b) of the Federal Rules of Civil Procedure for failure of the Complainant to prosecute or to comply with his order. In addition, the ALJ recommends dismissal under 29 C.F.R. § 18.40 on the basis that there is no genuine issue as to a material fact and Complainant is entitled to a summary decision because the complaint is time barred.

In June 1988, Complainant was laid off from his position with Respondent CDI Corporation (CDI), a contractor to respondent Carolina Power and Light Company (CP&L) at one of its nuclear power plants. The layoff was part of a general reduction in force. In November 1990, Complainant filed a complaint with the Department of Labor alleging that he was laid off so that a CP&L supervisor could retain a CDI employee to whom the supervisor allegedly was related. Complainant also alleged that CP&L had blacklisted him from reemployment because of quality concerns

that Complainant expressed at his 1988 exit interview.

Upon a thorough review of the record in this case, I agree with the ALJ that the complaint should be dismissed, although on the issue of failure to prosecute, I rely upon a different rule.

The record substantiates that despite the grant of additional time, Complainant did not comply with the ALJ's order to respond to Respondents' motions for a protective order and for summary decision. Under the regulations governing hearings before the Department's administrative law judges, the Federal Rules of Civil Procedure apply in a situation "not provided for or controlled by these rules, or by any statute, executive order or regulation." 18 C.F.R. § 18.1(a) (1991). The regulations governing a hearing in a "whistleblower" case under the ERA contain a provision authorizing an ALJ to dismiss a claim "upon the failure of the complainant to comply with a lawful order of the administrative law judge." 29 C.F.R. § 24.5(e)(4)(i)(B) (1991). In view of the specific provision in the rules for whistleblower hearings, the ALJ should not have relied upon the Federal Rules of Civil Procedure as the basis for dismissal for failure to prosecute. *See Walters v. Karmichael Tank Service*, Case No. 90-STA-12, (Dep. Sec'y's Final Dec. and Order, Jan. 22, 1991, slip op. at 3 (dismissing complaint under 29 C.F.R. § 18.6(d) where ALJ recommended dismissal under Rule 41, Fed. R. Civ. P.).

Section 210(b) of the ERA provides that: "any employee who believes that he has been discharged or otherwise discriminated against by any person in violation of subsection (a) of this section may, within thirty days after such violation occurs, file . . . a complaint with the Secretary of Labor . . . alleging such discharge or discrimination." 42 U.S.C. § 5851(b). Similarly, the rules governing procedures for the handling of discrimination complaints under the ERA provide, at 29 C.F.R. § 24.3(b), that a complaint shall be filed within 30 days after the occurrence of the alleged violation.

In moving for summary dismissal under 18 C.F.R. § 18.40, Respondents relied on affidavits and portions of Complainant's deposition to show that the complaint is time barred. Complainant has offered no affidavits or other material to refute the allegation that his complaint is untimely.

Respondents' materials show that CP&L informed Complainant in June 1988 that Complainant would be laid off as part of a reduction in force, and Complainant's employment ended that month. Complainant filed his complaint more than two years later, in November 1990. As to the layoff, the complaint is untimely. *See generally Delaware State College v. Ricks*, 449 U.S. 250, 258-261 (1980); *English v. Whitfield*, 858 F.2d 957, 960-962 (4th Cir. 1988), and cases cited therein.

[PAGE 3]

The timeliness of the blacklisting allegation is measured from the last occurrence of discrimination. *See Roberts v. North American Rockwell Corp.*, 650 F.2d 823, 828 (6th Cir. 1981). In cases under the ERA, the determination is whether there was an alleged discriminatory act within 30 days of the filing of the complaint. *See Garn v. Benchmark Technologies*, Case No. 88-ERA-21, Dec. and Order of Remand, Sept. 25, 1990, slip op. 9-11 and *Egenreider v. Metropolitan Edison Co./G.P.U.*, Case No. 85-ERA-23, Order of Remand, April 20, 1987, slip op. 7-8 (both remanding to ALJ for hearing on whether complainant timely alleged continuing

violation through blacklisting). *See also Doyle v. Alabama Power Co.*, Case No. 87-ERA-43, Sec. Dec., Sept. 29, 1989, *aff'd sub nom. Doyle v. Sec'y, U.S. Dep't of Labor*, No. 89-7863, slip op. at 2 (11th Cir. Nov. 26, 1991). Respondents' materials establish that Complainant was aware in 1988 that CP&L would not rehire him and that the last occasion on which CP&L declined to rehire Complainant was October 15, 1990, more than 30 days prior to the filing of his complaint on November 20, 1990. Complainant did not submit any materials to substantiate the allegation that CP&L rejected his application "a few weeks" prior to the filing of the complaint and that he received a letter from CP&L on November 3, 1990 outlining the reasons why he was not rehired.

A party opposing a motion for summary judgment under the analogous Fed. R. Civ. P. 56(e) "may not rest upon mere allegations or denials of his pleading, but must set forth specific facts showing that there is a genuine issue for trial. . . . Instead, the [party opposing summary judgment] must present affirmative evidence in order to defeat a properly supported motion for summary judgment." *Anderson v. Liberty Lobby*, 477 U.S. 242, 256-257 (1986). *See also*, *Carteret Sav. Bank, P.A. v. Compton, Luther & Sons, Inc.*, 899 F.2d 340, 344 (4th Cir. 1990).[1]

In light of Complainant's failure to present any affidavits or materials in support of the timeliness of his complaint, we agree with the ALJ that there is no genuine issue as to a material fact and Respondents are entitled to judgment as a matter of law because the complaint was untimely as to both the layoff and the alleged blacklisting. Accordingly, this case is DISMISSED WITH PREJUDICE.

SO ORDERED.

LYNN MARTIN
Secretary of Labor

[PAGE 4]

Washington, D.C.

OAA:CHIGGINS:kg:02/20/96
Room S-4309:FPB:523-9728

[ENDNOTES]

[1] This case arises in the Fourth Judicial Circuit.